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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 21, 22 and 32

THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Petitioners*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents*

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents*

FEDERAL POWER COMMISSION, *Petitioner*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS, J. R. FRANKEL, ET AL.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 620-642) is reported at 335 F. 2d 1004. The opinions of the Federal Power Commission, Opinion No. 398 (R. 549) and 398A (R. 606), are published at 30 F.P.C. 283 and 30 F.P.C. 682.

JURISDICTION

Respondents adopt the jurisdictional statement of the brief for the respondents, The Superior Oil Company, *et al.*, in Nos. 21, 22 and 32.

STATUTES INVOLVED

Respondents adopt the statement in the brief for the respondents, The Superior Oil Company, *et al.*, in Nos. 21, 22 and 32.

QUESTIONS PRESENTED

Respondents concur in Questions 1, 3 and 4 advanced by respondents, The Superior Oil Company, *et al.*, in Nos. 21, 22 and 32. Additionally, as to these respondents, J. R. Frankel, *et al.*, the question is also presented:

> 5. Whether the lower court's reversal of the Commission's refund order was not, in any event, correct because:
>
> (a) The Commission's procedures were essentially unfair and denied the producers a fair hearing;
>
> (b) No certificate of public convenience and necessity could have issued to these respondents under Section 7 of the Natural Gas Act since they were totally unable and unwilling to make the sale or perform the service purportedly authorized.

STATEMENT OF THE CASE

The brief for the Federal Power Commission contains a concise and generally fair statement of the case (FPC Br., pp. 3-7). As to J. R. Frankel, *et al.*,

respondents,[1] the following is also necessary to an understanding of the specific circumstances of their case, viz:

On August 30, 1957, J. R. Frankel and R. R. Frankel applied (R. 5-11) to the Commission for a certificate covering a sale to Transcontinental Gas Pipe Line Corporation from the North Thibodaux Field, Lafourche Parish, Louisiana, under a contract dated August 12, 1957 (R. 2-4). After hearing, the applicants were granted a certificate, unconditioned as to price, but requiring prompt acceptance (Opinion No. 315, dated September 4, 1958; R. 12-30). J. R. Frankel and R. R. Frankel filed the sales contract as their rate schedule on November 13, 1958 (R. 2, *et seq.*) which filing was accepted, and on January 30, 1959, commenced deliveries.

J. R. Frankel and R. R. Frankel sold the properties in question to Berkshire Oil Company (a family corporation) on August 1, 1960, and Berkshire was duly substituted as the applicant in the Commission's docket (R. 392-394), and the rate schedule was redesignated by the Commission as Berkshire's schedule. By instrument effective as of November 2, 1961, Berkshire sold these properties, along with other properties, to Continental Oil Company (R. 568-569). Berkshire was then promptly liquidated and its rights and obligations became vested in its former shareholders, J. R. Frankel, et al. (R. 568-569). Continental Oil Company sought and obtained from the Commission a certificate to continue the sale in question (*In the Mat-*

[1] Respondents are J. R. Frankel, R. R. Frankel, L. R. Frankel, Mae Frankel Shalett, H. T. Shalett, and the Estate of the late Maurice Frankel. Respondents are also petitioners in No. 34 (October Term, 1965).

ter of Continental Oil Company, F.P.C. Docket No. CI62-5108; *Cf.* R. 542-544, 568-569). A motion to substitute J. R. Frankel, et al., as parties to the instant docket was granted (R. 542; 568).

Meanwhile, the Commission's order granting respondents' predecessors an unconditioned certificate had been reversed and remanded.[2] The remanded proceeding was at first consolidated with the Area Rate Proceeding, AR61-2 (R. 376, *et seq.*). On January 10, 1962, the Commission issued an *ex parte* order (R. 395-401) notifying the parties for the first time that the Commission proposed to impose on the producers a refund obligation. The instant docket and others were then severed from the Area Rate Proceeding, consolidated with other dockets involving remands from various circuits, and a hearing date fixed (R. 409-422).

Because respondents had no interest in any continuing sale, and the only question as to them was the issue of refunds, respondents moved to sever the instant docket from the consolidated proceedings (R. 453-455). This motion was never acted upon. Hearings were then held (R. 200-254). Respondents offered evidence (R. 343-351) designed to show, among other things, that their predecessor's unit cost of service exceeded the initial contract rate; all such evidence was excluded out-of-hand (R. 489-493).

The attention of the Examiner and of the Commission was called to the fact that respondents' predecessor, Berkshire, had sold the property and that Continental had been certificated in its place; that Berkshire had been dissolved; and that respondents did not seek a certificate and were wholly unable to fulfill its

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[2] *United Gas Improvement Company* v. *F.P.C.*, 361 U.S. 195.

responsibilities (*Cf.* R. 239-242; 248-249; 568-569). Nevertheless, respondents were issued a certificate by the Commission. The only provision of this order that could have any possible operative effect on respondents is that provision ordering respondents to make refunds.

The lower court agreed with the Commission as to its power, under the unique circumstances of this case, to impose refunds on respondents, but held that the amount of the refunds should be measured against a just and reasonable rate to be determined hereafter. Respondents sought a writ of certiorari from this Court, which petition has not been acted upon.

SUMMARY OF ARGUMENT

The respondents are the former stockholders of a dissolved corporation, Berkshire. Berkshire had sold the property in question to Continental, and Continental had been granted a permanent certificate in lieu of Berkshire. Berkshire dissolved. All of this was done openly and with proper advice to and consent by the Commission. The effect is to preclude the issuance of any certificate under Section 7 of the Act to these respondents who are wholly unable to continue any sale or make any deliveries. And if the Act denies the Commission the power to issue any certificate, it also denies the Commission the power to impose a condition on the certificate, for the condition may not stand when the certificate falls. While the lower court did not agree with this argument, nevertheless, it supports the Court's reversal of the Commission's refund "order".

In any event, the proceedings before the Commission were so essentially unfair as to deny due process. The Commission pre-determined the existence of a

refund obligation, without notice or hearing; failed to provide any standards or rules by which materiality of evidence would be judged; excluded all evidence relating to public convenience and necessity other than "price line" evidence, including evidence designed to show the nonexistence of a refund obligation; and then measured the extent of the pre-determined liability against the "price line" without regard to whether or not the "line" was less than a just and reasonable rate or was confiscatory. Here, too, the lower Court's reversal of the refund "order" is supported, although on a basis other than that stated below.

ARGUMENT

As to Questions 1, 3 and 4 here presented, respondents adopt the position assumed in the Brief for Respondents, The Superior Oil Company, *et al.*, with slight addition. Question 5, on the other hand, is not covered in that brief.

As to all phases of the refund issue, Question 5 has a significant bearing, as we will demonstrate.

I. The Essential Unfairness of the Commission's Refund Order Justified the Lower Court's Reversal

Here, an unsought, unwanted and unacceptable certificate of public convenience and necessity impossible of performance, is thrust upon the successors of a producer. If viable at all, all that the order can accomplish is to order the repayment of past excessive rates. No exercise in semantics can change the character of such an order. It results in reparations, which the Commission is powerless to grant.[3]

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[3] *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 598. And see *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246.

Further, the order is based upon a record that mocks due process. On January 10, 1962 (R. 395-405), without notice or opportunity to be heard, the Commission pre-determined an obligation to make refunds. The Commission's order of January 10, 1962, together with its order denying rehearing on March 7, 1962 (R. 410-421), was relied upon by the Presiding Examiner as determinative (R. 522-523). The Commission, in turn, relied upon the Presiding Examiner's decision (R. 561). The net result was that, without notice or opportunity to be heard, the order of January 10, 1962 made an *ad hoc* determination of refund obligations which effectively closed the mind of the Examiner on the subject and, indeed, the Commission's own mind.

Again, respondents' predecessor was required by the Commission's order of March 7, 1962 (R. 410-421), to file, in advance of hearing, the evidence on which it would rely; but the order did not specify the kind of evidence which the Commission would consider. Respondents' predecessor complied, under accompanying protest. The protest read, in part (R. 242):

> "Finally, Berkshire shows that the Commission's order of March 7, 1962 requires petitioner to determine at its peril the type of evidence which the Commission may hereafter 'deem material to determination of the public interest initial price or prices'. Although it is now almost eight years since the decision of the Supreme Court of the United States in Phillips, the Commission has not yet laid down appropriate guides as to what evidence will be deemed material to determination of the public interest initial price or prices. Under such circumstances, to require a litigant to select in advance of hearing the evidence to be submitted at the hearing, to be restricted to the previously-filed evidence in its presentation, and thereafter to determine, upon rules thereafter to be announced,

the materiality of such evidence, violates the fundamental principles of fair play, as well as procedural due process."

The essential unfairness of this procedure was perpetuated at the hearing. Although this Court's decision in CATCO[4] expressly required an evidentiary showing of a "reason why" an out-of-line price would meet the tests of the public interest, the Commission excluded all such evidence, even that offered for the express purposes (1) "to show that the filed rates were just and reasonable", (2) "to show that any reduction in the filed rates would result in confiscation", and (3) "to show that the imposition of a retroactive rate condition would involve serious inequities . . ." (R. 238-242).

What the Commission did, in summary, was the equivalent of a Star Chamber inquiry. By predetermining the existence of the obligation, by excluding all evidence designed to show the nonexistence of the obligation, and by measuring the extent of the obligation in the vacuum of this record it effectively denied to *all* respondents any semblance of a fair hearing.[5] And, as to these respondents, it confiscated their property without due process or just compensation.[6]

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[4] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378.

[5] By due process of law is meant ". . . a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial". Argument of Daniel Webster, Esq., in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581.

[6] This, because the excluded evidence showed a revenue deficiency even under the contract rates. The imposition of a confiscatory rate violated the Fifth Amendment to the Constitution and the Natural Gas Act. *F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586.

These factors, under the circumstances of this case, would have supported the reversal of the refund order in any event; necessarily they support the basis of the reversal given in the opinion below.

II. The Instant Certificate Issued in Violation of Section 7 of the Natural Gas Act Because Respondents Are Unable and Unwilling to Meet the Requirements for Certification

Section 7 of the Act requires that a certificate "shall be denied" unless the Commission finds that the applicant "is able and willing properly to do the acts and perform the service proposed" and that "the proposed . . . sale . . . is or will be required by the present or future public convenience and necessity . . ." Positive findings are required and substantial evidence must support them.[7]

The record herein is clear that respondents' predecessor, Berkshire sold the producing property effective November 2, 1961, that the Commission granted Continental a permanent certificate for the continuation of the sale, effective November 2, 1961, and allowed Continental to succeed to Berkshire's rate schedule. Berkshire dissolved and the Commission substituted its former stockholders (these respondents) as parties.

These actions of the Commission were taken advisedly, and with full knowledge of the sale to Continental, of Berkshire's dissolution, and of Berkshire's (and later respondents') reiterated determination not to accept a certificate containing a repugnant price condition. The effect of these actions was to put it beyond respondents' power to receive or accept, and beyond the Commission's power to issue to respondents, any

[7] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 392.

certificate whatsoever. On the face of it, these respondents can sell no gas and make no deliveries. The Commission recognized this when it certificated Continental.

The fact of the matter is that the Commission was determined to exact reparations. In order to avoid the appearance of a reparations order, it used the form of a condition in a certificate. But in so doing, it fell into a springe of its own devising. By disguising its reparations order as a certificate "condition" under Section 7, it imposed upon its certification the requirements of Section 7. If it is a certificate condition, the certificate itself must meet the tests of Section 7; the "condition" cannot survive separate and apart from its certificate.

As to these respondents, the above showing would have been ample ground for a reversal by the lower court of the Commission's order granting a certificate. While the lower court refused to disagree with the Commission in this particular, this issue serves as additional support for the reversal by the lower court of the refund order.

CONCLUSION

For the foregoing reasons, and subject to the action of the Court on the questions raised in No. 26, and in the Petitions in Nos. 34, 35 and 36 now pending, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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